

**ORIGINAL**United States District Court  
Southern District of Texas  
FILED

SEP 19 2005

MICHAEL N. MILBY, CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

HOWARD BOYER,

Plaintiff,

vs.

HOME DEPOT U.S.A., INC.,

Defendant.

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CIVIL ACTION NO. \_\_\_\_\_

JURY DEMANDED

**DEFENDANT'S NOTICE OF REMOVAL**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant Home Depot U.S.A., Inc. ("Home Depot"), who files this its Notice of Removal on the basis of diversity jurisdiction, and would show the Court as follows:

1. Home Depot is the Defendant in a civil action pending in the County Court at Law No. 1 of Nueces County, Texas, entitled *Howard Boyer vs. Home Depot U.S.A., Inc.*, Cause No. 05-60900-1 (hereinafter referred to as the "State Court Action"). True and correct copies of all process, pleadings, and orders served upon Home Depot in the State Court Action are attached hereto as Exhibit "A," as required by 28 U.S.C. § 1446(a).

2. The State Court Action was filed on May 20, 2005. On or about September 7, 2005, Defendant received Plaintiff's answers to Defendant's First Set of Interrogatories (dated September 6, 2005), in which Plaintiff stated that he was unable to continue his employment due to his injuries from the incident in question and that he was to make \$40,000-60,000 per year at that employment. Further, on or about September 7, 2005, Defendant received Plaintiff's responses to Defendant's Request for Disclosure (dated September 6, 2005), and in connection with those responses, Plaintiff produced medical bills in excess of \$25,000 that he claims were

incurred as a result of the incident in question. Those pleadings created a definite basis for concluding that Plaintiff's claimed damages greatly exceed \$75,000, and constituted the first papers received by Defendant from which Defendant was able to ascertain that the case is one that is removable. Accordingly, this notice is timely filed within thirty (30) days of Home Depot's first notice that this Court has jurisdiction over the subject matter of this case. Therefore, this Notice of Removal is timely filed under *28 U.S.C. § 1446(b)*.

3. The district courts of the United States have original jurisdiction over this action based on diversity of citizenship among parties, in that Home Depot is now and was at the time the action was commenced, diverse in citizenship from Plaintiff. Plaintiff Howard Boyer is a citizen of the State of Texas. Home Depot is not now and was not at the time the suit was commenced, a citizen of the State of Texas. Specifically, Home Depot is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. Therefore, Home Depot is a citizen of the States of Delaware and Georgia.

4. The amount in controversy in the State Court Action is in excess of \$75,000.00, exclusive of interests and costs. Accordingly, the State Court Action is within the original jurisdiction of this Court pursuant to *28 U.S.C. § 1332*, as it is a civil action wholly between citizens of different states, and, the amount in controversy is in excess of the Court's jurisdictional minimum for diversity cases.

5. Under *28 U.S.C. § 1446(a)*, venue of the removed action is proper in this Court as it is the district and division embracing the place where the State Court Action is pending.

6. Pursuant to *28 U.S.C. § 1446(d)*, Home Depot will promptly give written notice of the filing of this notice of removal to Plaintiff's counsel and will further file a copy of this Notice of

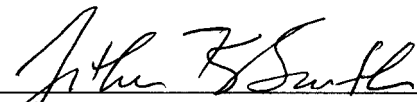
Removal with the Clerk of Court of Nueces County, Texas, where the action was previously pending.

7. **Jury Demand** –Home Depot hereby requests trial by jury on all issues and claims in this cause.

WHEREFORE, Home Depot hereby removes the case styled *Howard Boyer vs. Home Depot U.S.A., Inc.*; Cause No. 05-60900-1 from the County Court at Law No. 1 of Nueces County, Texas, on this 16<sup>th</sup> day of September 2005, and, further, respectfully requests that this Court assume full jurisdiction of this proceeding for all purposes as if originally filed in this Court, including but not limited to issuing any orders necessary to stay proceedings in the State Court Action.

Respectfully submitted,

LAW OFFICES OF ARTHUR K. SMITH,  
a Professional Corporation

By:   
Arthur K. Smith  
Texas State Bar No. 18534100  
Southern District No. 2705  
Attorney-in-Charge

507 Prestige Circle  
Allen, Texas 75002  
Telephone: (469) 519-2500  
Facsimile: (469) 519-2555

ATTORNEY FOR DEFENDANT  
HOME DEPOT U.S.A., INC.

**CERTIFICATE OF SERVICE**

On the 16<sup>th</sup> day of September, 2005, a true and correct copy of the above and foregoing pleading was served upon counsel for Plaintiff via facsimile and certified mail, return receipt requested, in accordance with Rule 5 of the Federal Rules of Civil Procedure.

  
\_\_\_\_\_  
Arthur K. Smith

150005.29/fed not.removal

# EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

HOWARD BOYER,

Plaintiff,

vs.

HOME DEPOT U.S.A., INC.,

Defendant.

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CIVIL ACTION NO. \_\_\_\_\_

JURY DEMANDED

**INDEX OF MATTERS FILED**

- |       |  |
|-------|--|
| Tab 1 | All executed process in this case;                                       |
| Tab 2 | Pleadings asserting causes of action and all answers to those pleadings; |
| Tab 3 | All orders signed by the state judge;                                    |
| Tab 4 | Docket sheet;  |
| Tab 5 | A list of all counsel of record  |

TAB "1"

**CT CORPORATION**  
A WoltersKluwer Company

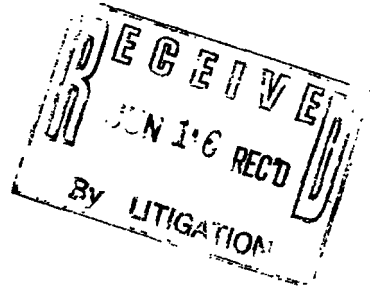
24264 11

**Service of Process**  
**Transmittal**  
06/15/2005  
Log Number 510303410

**TO:** Nancy Bunker  
The Home Depot, Inc.  
2455 Paces Ferry Road, Building C-8th Floor  
Atlanta, GA, 30339-4024

**RE:** Process Served in Texas

**FOR:** Home Depot International, Inc. (Domestic State: DE)



**ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:**

<b>TITLE OF ACTION:</b>	Howard Boyer, Pltf. vs. Home Depot International, Inc., Dft.
<b>DOCUMENT(S) SERVED:</b>	Citation, Plaintiff's Original Petition, Civil Case Information Sheet
<b>COURT/AGENCY:</b>	County Court at Law No. 1 Nueces County, Texas, Nueces, Tx Case # 05809000001
<b>NATURE OF ACTION:</b>	Personal Injury - Failure to Maintain Premises in a Safe Condition - Personal injuries sustained while on defendants property.
<b>ON WHOM PROCESS WAS SERVED:</b>	C T Corporation System, Dallas, TX
<b>DATE AND HOUR OF SERVICE:</b>	By Process Server on 06/15/2005 at 06:30
<b>APPEARANCE OR ANSWER DUE:</b>	10:00 a.m. on the Monday next after the expiration of 20 days
<b>ATTORNEY(S) / SENDER(S):</b>	Brunkerhoefer Law Firm, P.C. 520 Lawrence Street Corpus Christi, Texas, 78401
<b>ACTION ITEMS:</b>	SOP Papers with Transmittal, via Fed Ex Standard Overnight, 790545510321
<b>SIGNED:</b>	C T Corporation System
<b>PER:</b>	Beatrice Casarez
<b>ADDRESS:</b>	350 North St. Paul Street Dallas, TX, 75201
<b>TELEPHONE:</b>	214-979-1172

Page 1 of 1 / AG

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action.



COPY

Citation of Personal Service - RESIDENT

Lit. Seq. # 5.002.01

No. 05-60900-00-0-1

THE STATE OF TEXAS

NOTICE TO DEFENDANT: You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

TO:

HOME DEPOT INTERNATIONAL, INC.BY SERVING ITS REGISTERED AGENT, CT CORPORATION SYSTEM, 350 N. ST. PAUL STREET, DALLAS, TEXAS 75201

the DEFENDANT, GREETING:

You are commanded to appear by filing a written answer to the

PLAINTIFF'S ORIGINAL PETITION

at or before 10:00 o'clock a.m. of the Monday next after the expiration of 20 days after the date of service of this citation before the

Honorable County Court at Law NO. 1 of Nueces County, Texas at the Courthouse of said County in Corpus Christi, Texas. Said PETITION was filed on MAY 20, 2005. A copy of same accompanies this citation.

The file number of said suit being No. 05-60900-00-0-1.  
The style of the case is:

BOYER, HOWARD

VS.

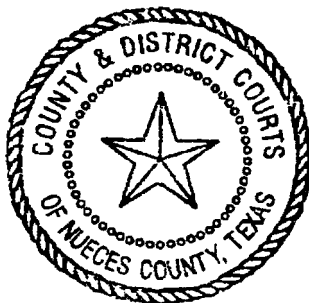
HOME DEPOT INTERNATIONAL, INC.

Said petition was filed in said court by DONNA B. EVERITT  
(Attorney for PLAINTIFF), whose address is  
520 LAWRENCE STREET, CORPUS CHRISTI TX 78401

The nature of the demand is fully shown by a true and correct copy of the Petition accompanying this citation and made a part hereof.

The officer executing this writ shall promptly mail the same according to requirements of law, and the mandates thereof, and make due return as the law directs.

Issued and given under my hand and seal of said Court at Corpus Christi, Texas, this the 27th day of MAY, A.D. 2005.

PATSY PEREZ, DISTRICT CLERK

Nueces County, Texas

901 Leopard

(P.O. Box 2987)

Corpus Christi, Texas 78403-2987

By: Idalia G. Harvey, Deputy  
IDALIA G. HARVEY

TAB "2"

CAUSE NO. 05-60900-1

HOWARD BOYER,  
Plaintiff

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§

NUECES COUNTY COURT

VS.

AT LAW NO. 1

HOME DEPOT INTERNATIONAL, INC.,  
Defendant

NUECES COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW HOWARD BOYER, here and after referred to by name or as "Plaintiff," complaining of HOME DEPOT INTERNATIONAL, INC., hereinafter referred to as "Defendant," and for cause of action would respectfully show unto the Court the following:

**I.  
DISCOVERY**

Plaintiff hereby notifies the Court and Defendant of his intention to prosecute this case pursuant to the discovery provisions of Tex. R. Civ. P. 190.4 (Level III). To this end, Plaintiff respectfully requests the Court's issuance of an appropriate discovery control plan following a docket control conference.

**II.  
PARTIES**

Plaintiff, HOWARD BOYER, an individual, is a resident of Corpus Christi, Nueces County, Texas. Defendant is HOME DEPOT INTERNATIONAL, INC., a corporation licensed to do business in the state of Texas, upon whom service may be made by serving their registered agent, CT Corporation System, who may be found at 350 N. St. Paul Street, Dallas, Dallas County, Texas 75201.

**III.  
VENUE**

Venue is proper in Nueces County, Texas pursuant to § 15.002(a)(1) of the Tex. Civ. Prac. & Rem. Code (Vernon's 1997), as Nueces County, Texas was and is the "county in which all or a substantial part of the events or omissions giving rise to the claim occurred."

**IV.  
OPERATIVE FACTS**

On or about April 7, 2004, HOWARD BOYER was an invitee on Defendant's property, having gone there for the purpose of buying a gutter for his home. Plaintiff brings this suit to recover for personal injuries sustained as a result of a dangerous condition on Defendant's property, specifically, the dangerous manner in which they stack the gutters for sale. Plaintiff was injured while attempting to remove a gutter from its rack, when another gutter fell over and caused the gutter he was attempting to remove to fall and slice open the front of his left foot. This injury was so severe that Plaintiff had to have surgery to repair the damage to his ankle and foot. This accident caused Plaintiff to suffer serious injuries to his person as well as causing severe mental anguish as a result of those injuries.

**V.  
CAUSE OF ACTION**

Defendant knew of the unreasonably dangerous condition on its property and neither corrected nor warned the Plaintiff of it. Plaintiff had no knowledge of the dangerous condition and could not have reasonably been expected to discover it. Defendant's failure to correct the condition or to warn Plaintiff constituted negligence, and such negligence was a proximate cause of the incident in question and Plaintiff's resulting injuries.

**VI.  
DAMAGES**

As a result of the incident described above, Plaintiff has suffered severe personal injuries causing him to experience physical pain, scarring, permanent bodily impairment and mental anguish and will in reasonable probability, continue to do so in the future by reason of the nature of severity of his injuries. Plaintiff has been caused to incur medical charges and expenses on his behalf in the past and will in reasonable probability, continue to incur medical expenses in the future for treatment of his injuries. Plaintiff seeks to recover all of the above referenced damages as well as any and all other damages provided by law in an amount within the jurisdictional limits of this court.

**VII.  
TEX. R. CIV. P. 54**

All conditions precedent to bringing and maintaining this lawsuit have been performed or have occurred.

**VIII.  
JURY DEMAND**

PLAINTIFF RESPECTFULLY REQUESTS A TRIAL BY JURY,  
FOR WHICH THE APPROPRIATE FEE HAS BEEN TENDERED.

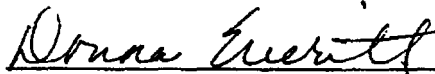
**IX.  
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the Defendant be cited to appear and answer herein and that, upon final trial of this cause, Plaintiff has:

- (1.) Judgment against the Defendant for actual damages in an amount  
within the jurisdictional limits of this Court;
- (2.) Pre-judgment interest, as allowed by law;
- (3.) Post-judgement interest, as allowed by law;
- (4.) Costs of Court;
- (5.) Costs of Suit; and
- (6.) Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

BRUNKENHOEFER LAW FIRM, P.C.  
520 Lawrence Street  
Corpus Christi, Texas 78401  
Phone No. (361) 888-8808  
Fax No. (361) 888-6753



**Donna B. Everitt**  
SBN: 24045856

**Robert E. Brunkenhoefer**  
SBN: 03256000

Jun-28-2005 04:34pm

From-LAW OFFIL

F ARTHUR K SMITH

4695182555

T-875 P.002/003 F-636

LAW OFFICES OF  
**ARTHUR K. SMITH**  
 A PROFESSIONAL CORPORATION

507 PRESTIGE CIRCLE  
 ALLEN, TEXAS 75002-3438

TELEPHONE (469) 519-2500  
 FACSIMILE (469) 519-2555

ARTHUR K. SMITH  
 DIRECT (469) 519-2555  
 asmith@aksmilaw.com

June 28, 2005

Donna B. Everitt  
 Brunkenhoefer Law Firm, P.C.  
 520 Lawrence Street  
 Corpus Christi, Texas 78401

Via Facsimile (361) 888-6753

Re: Cause No. 05-60900-1; In the County Court at Law No. 1 in Nueces County, Texas; *Howard Boyer v. Home Depot International, Inc.*

Dear Ms. Everitt:

I am writing concerning the above-referenced case (the "Lawsuit").

Your client has sued an incorrect party. Home Depot International, Inc. ("HDI") was neither the owner nor operator of the Home Depot store in question as of April 7, 2004. Rather, on that date, the store was owned and operated by Home Depot U.S.A., Inc.

If your client will agree to (a) non-suit his claims against HDI, and (b) withdraw any written discovery requests previously served on HDI, then:

- (1) I will accept service of citation and petition on behalf Home Depot U.S.A., Inc.; and
- (2) HDI will agree that, in the event the Plaintiff later amends his petition in the Lawsuit to rename HDI based on discovery of evidence that it was actually store owner or operator on the date in question, then:
  - (a) I will accept service of the amended petition on behalf of HDI, and
  - (b) HDI will agree not to raise limitations as an affirmative defense to claims in the amended petition.

If this proposed agreement is acceptable to your client, please confirm that by signing this letter on his behalf in the space provided below. If this letter raises any issues that you would like to discuss with me, my direct dial number is (469) 519-2525.

FILED-PATSY HENRIZ  
 CLERK OF COUNTY &  
 DISTRICT COURTS  
 NUECES COUNTY, TEXAS  
 BY     DPTV  
 2005 JUL A 9 24

Jun-28-2005 04:34pm From-LAW OFFICE F ARTHUR K SMITH

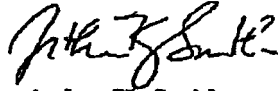
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T-075 P.003/003 F-636

Donna B. Everitt  
June 28, 2005  
Page 2

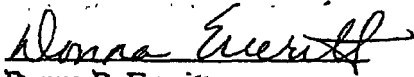
Best regards.

Very truly yours,



Arthur K. Smith  
Attorney for HDI and Home Depot U.S.A., Inc.

AGREED:



Donna B. Everitt  
Attorney for Plaintiff

AKS:sc

Firm/Client: New/Boyer, Everitt, Parities, Jr

CAUSE NO. 05-60900-1

HOWARD BOYER,  
Plaintiff

vs.

HOME DEPOT INTERNATIONAL, INC.,  
Defendant

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NUECES COUNTY COURT

AT LAW NO. 1

NUECES COUNTY, TEXAS

**PLAINTIFF'S NOTICE OF NONSUIT WITHOUT  
PREJUDICE OF HOME DEPOT INTERNATIONAL, INC.**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HOWARD BOYER ("Plaintiff"), by and through his attorneys of record, and files this his Notice of Non-Suit Without Prejudice of his claims against Defendant-HOME DEPOT INTERNATIONAL, INC.

Plaintiff moves the Court to non-suit the above-referenced Defendant without prejudice to Plaintiff's right to re-file his claims against same. Plaintiff further moves the Court to tax costs of this action against the party incurring said costs.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the Court non-suit Defendant-HOME DEPOT INTERNATIONAL, INC. from the instant cause, without prejudice to Plaintiff's right to re-file his claim(s) against same, and that the costs of said action be taxed against the party incurring said costs.

FILED-PATSY T. BOYER  
CLERK OF COUNTY &  
DISTRICT COURTS  
NUECES COUNTY, TEXAS  
BY                      DPTY  
2005 JUL 11 A 9:24



Respectfully submitted,

BRUNKENHOEFER LAW FIRM, P.C.  
520 Lawrence Street  
Corpus Christi, Texas 78401  
Phone No. (361) 888-8808  
Fax No. (361) 888-6753

A handwritten signature in cursive script, reading "Donna B. Everitt", written over a horizontal line.

**Donna B. Everitt**  
SBN: 24045856

**Robert E. Brunkenhoefer**  
SBN: 03256000

**CERTIFICATE OF SERVICE**

I, Donna B. Everitt, do hereby certify that a true and correct copy of the above and foregoing PLAINTIFFS' NOTICE OF NONSUIT WITHOUT PREJUDICE OF HOME DEPOT INTERNATIONAL, INC. has been duly served upon:

Arthur Smith  
507 Prestige Circle  
Allen, Texas 75002-3438

**CMRRR**

in accordance with all applicable provisions of the Texas Rules of Civil Procedure on this the 5<sup>th</sup> day of July, 2005.

  
Donna B. Everitt

CAUSE NO. 05-60900-1

HOWARD BOYER,	§	NUECES COUNTY COURT
Plaintiff	§	
	§	
VS.	§	AT LAW NO. 1
	§	
HOME DEPOT U.S.A., INC.,	§	
Defendant	§	NUECES COUNTY, TEXAS

**PLAINTIFF'S FIRST AMENDED PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**COMES NOW** HOWARD BOYER, here and after referred to by name or as "Plaintiff," complaining of HOME DEPOT U.S.A., INC., hereinafter referred to as "Defendant," and for cause of action would respectfully show unto the Court the following:

**I.  
DISCOVERY**

Plaintiff hereby notifies the Court and Defendant of his intention to prosecute this case pursuant to the discovery provisions of Tex. R. Civ. P. 190.4 (Level III). To this end, Plaintiff respectfully requests the Court's issuance of an appropriate discovery control plan following a docket control conference.

**II.  
PARTIES**

Plaintiff, HOWARD BOYER, an individual, is a resident of Corpus Christi, Nueces County, Texas. Defendant is HOME DEPOT U.S.A., INC., a corporation licensed to do business in the state of Texas, upon whom service may be obtained by serving Defendant's designated agent, Arthur Smith, who may be found at 507 Prestige Circle, Allen, Texas 75002-3438.

**III.  
VENUE**

Venue is proper in Nueces County, Texas pursuant to § 15.002(a)(1) of the Tex. Civ. Prac. & Rem. Code (Vernon's 1997), as Nueces County, Texas was and is the "county in which all or a substantial part of the events or omissions giving rise to the claim occurred."

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As a result of the incident described above, Plaintiff has suffered severe personal injuries causing him to experience physical pain, scarring, permanent bodily impairment and mental anguish and will in reasonable probability, continue to do so in the future by reason of the nature of severity of his injuries. Plaintiff has been caused to incur medical charges and expenses on his behalf in the past and will in reasonable probability, continue to incur medical expenses in the future for treatment of his injuries. Plaintiff seeks to recover all of the above referenced damages as well as any and all other damages provided by law in an amount within the jurisdictional limits of this court.

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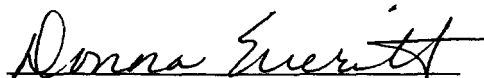
**IX.**  
**PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the Defendant be cited to appear and answer herein and that, upon final trial of this cause, Plaintiff has:

- (1.) Judgment against the Defendant for actual damages in an amount  
within the jurisdictional limits of this Court;
- (2.) Pre-judgment interest, as allowed by law;
- (3.) Post-judgement interest, as allowed by law;
- (4.) Costs of Court;
- (5.) Costs of Suit; and
- (6.) Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

BRUNKENHOEFER LAW FIRM, P.C.  
520 Lawrence Street  
Corpus Christi, Texas 78401  
Phone No. (361) 888-8808  
Fax No. (361) 888-6753



**Donna B. Everitt**  
SBN: 24045856

**Robert E. Brunkenhoefer**  
SBN: 03256000

CAUSE NO. 05-60900-1

HOWARD BOYER,

Plaintiff,

vs.

HOME DEPOT U.S.A., INC.,

Defendants.

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NUECES COUNTY COURT

AT LAW NO. 1

NUECES COUNTY, TEXAS

**ORIGINAL ANSWER AND SPECIAL EXCEPTIONS OF DEFENDANT  
HOME DEPOT U.S.A., INC., TO PLAINTIFF'S FIRST AMENDED PETITION**

TO THE HONORABLE JUDGE:

COMES NOW Home Depot U.S.A., Inc. (hereinafter referred to as "Defendant"), Defendant in the above-entitled and numbered cause, and for its Original Answer and Special Exceptions to Plaintiff's First Amended Petition would respectfully show unto the Court as follows:

**SPECIAL EXCEPTIONS**

**I.**

Defendant specially excepts to Plaintiff's First Amended Petition (the "Petition") in its entirety on the grounds that it fails to specify the maximum damages sought; and pursuant to Tex. R. Civ. P. 47, requests that Plaintiff be required to specify the maximum amount of damages sought in this proceeding. Of which special exception, Defendant prays judgment of the Court

**II.**

Defendant specially excepts to paragraph VI of the Petition wherein Plaintiff seeks recovery for unspecified past and future medical expenses, and pursuant to Tex. R. Civ. P. 56, requests that

FILED-PATSY PEREZ  
CLERK OF COUNTY &  
DISTRICT COURTS  
NUECES COUNTY, TEXAS  
BY MM  
2005 AUG 23 P 2:12  
DPT

Plaintiff be required to itemize all special damages for which he seeks recovery. Of which special exception, Defendant prays judgment of the Court.

**III.**

Defendant further specially excepts to the prayer for relief of the Petition wherein it is alleged that Plaintiff seeks recovery for "such other and further relief to which Plaintiff may be justly entitled." Defendant is entitled to know the specific types of relief for which Plaintiff seeks recovery; accordingly, this global claim for relief should be stricken or, in the alternative, Plaintiff should be required to replead to specifically identify each type of damages for which he seeks recovery. Of which special exception, Defendant prays judgment of the Court.

**ORIGINAL ANSWER**

**IV.**

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant hereby enters a general denial, and demands that Plaintiff be required to prove his allegations by a preponderance of the evidence.

**V.**

Pleading further, Defendant affirmatively alleges that Plaintiff Howard Boyer's own negligence was the sole proximate cause, or alternatively, a proximate cause of the incident made the basis of this suit and Plaintiff's damages, if any.

**VI.**

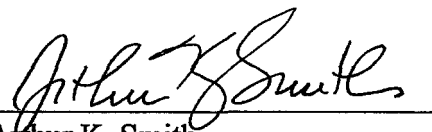
Pursuant to the Texas Government Code § 52.046 (Vernons 1998), Defendant requests that a court reporter attend all sessions of the Court in conjunction with this civil action.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court sustain its Special Exceptions, strike the appropriate pleadings and require Plaintiff to amend within a

reasonable time certain, and the Plaintiff take nothing by this action and Defendant be dismissed with its costs, and for such other relief, both general and specific, at law or in equity, to which Defendant may be justly entitled.

Respectfully submitted,

LAW OFFICES OF ARTHUR K. SMITH,  
A Professional Corporation

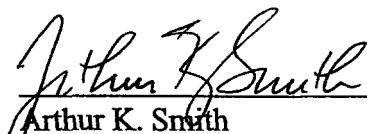
By:   
Arthur K. Smith  
State Bar No. 18534100

507 Prestige Circle  
Allen, Texas 75002  
Telephone: (416) 519-2500  
Facsimile: (416) 519-2555

ATTORNEY FOR DEFENDANT  
HOME DEPOT U.S.A., INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 19<sup>th</sup> day of August, 2005, a copy of the foregoing pleading was forwarded via facsimile and U.S. mail, first class, postage prepaid, to Plaintiff's counsel.

  
Arthur K. Smith

150005.29/Answer.Orig



CAUSE NO. 05-60900-1

HOWARD BOYER, Plaintiff	§ § §	NUECES COUNTY COURT
VS.	§ §	AT LAW NO. 1
HOME DEPOT U.S.A., INC., Defendant	§ §	NUECES COUNTY, TEXAS

**PLAINTIFF'S SECOND AMENDED PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**COMES NOW** HOWARD BOYER, here and after referred to by name or as "Plaintiff," complaining of HOME DEPOT U.S.A., INC., hereinafter referred to as "Defendant," and for cause of action would respectfully show unto the Court the following:

**I.  
DISCOVERY**

Plaintiff hereby notifies the Court and Defendant of his intention to prosecute this case pursuant to the discovery provisions of Tex. R. Civ. P. 190.4 (Level III). To this end, Plaintiff respectfully requests the Court's issuance of an appropriate discovery control plan following a docket control conference.

**II.  
PARTIES**

Plaintiff, HOWARD BOYER, an individual, is a resident of Corpus Christi, Nueces County, Texas. Defendant is HOME DEPOT U.S.A., INC., a corporation licensed to do business in the state of Texas, upon whom service may be obtained by serving Defendant's designated agent, Arthur Smith, who may be found at 507 Prestige Circle, Allen, Texas 75002-3438.

**III.  
VENUE**

Venue is proper in Nueces County, Texas pursuant to § 15.002(a)(1) of the Tex. Civ. Prac. & Rem. Code (Vernon's 1997), as Nueces County, Texas was and is the "county in which all or a substantial part of the events or omissions giving rise to the claim occurred."

FILED  
CLERK OF DISTRICT COURT  
NUECES COUNTY, TEXAS  
2005 SEP 30 P 12:45  
BY: [Signature] ERTY

**IV.  
OPERATIVE FACTS**

On or about April 7, 2004, HOWARD BOYER was an invitee on Defendant's property, having gone there for the purpose of buying a gutter for his home. Plaintiff brings this suit to recover for personal injuries sustained as a result of a dangerous condition on Defendant's property, specifically, the dangerous manner in which they stack the gutters for sale. Plaintiff was injured while attempting to remove a gutter from its rack, when another gutter fell over and caused the gutter he was attempting to remove to fall and slice open the front of his left foot. This injury was so severe that Plaintiff had to have surgery to repair the damage to his ankle and foot. This accident caused Plaintiff to suffer serious injuries to his person as well as causing severe mental anguish as a result of those injuries.

**V.  
CAUSE OF ACTION**

Defendant knew of the unreasonably dangerous condition on its property and neither corrected nor warned the Plaintiff of it. Plaintiff had no knowledge of the dangerous condition and could not have reasonably been expected to discover it. Defendant's failure to correct the condition or to warn Plaintiff constituted negligence, and such negligence was a proximate cause of the incident in question and Plaintiff's resulting injuries.

**VI.  
DAMAGES**

As a result of the incident out of which this suit arises, Plaintiff suffered various injuries to his body and/or mind. The injuries of Plaintiff have caused him to suffer physical pain, suffering and mental anguish, and Plaintiff will, in all reasonable probability, continue to experience such physical pain, suffering and mental anguish discernibly in the future.

If it be found that Plaintiff has suffered from any predispositions, conditions or bodily infirmities prior to the date of the collision, Plaintiff would show the Court and jury that the same were neither disabling nor painful, but that as a result of the injuries suffered by Plaintiff on such occasion, and the effects thereof, the same had been aggravated and made worse, and caused to become disabling and painful.

On account of the nature, seriousness, and severity of Plaintiff's injuries, Plaintiff has required medical care. Plaintiff has been required to pay and incur liability to pay the charges which have been and will be made for such medical services. It is reasonably probable that Plaintiff will require additional medical attention for medical care, nursing, and/or hospital services and that Plaintiff will be required to pay and incur liability to pay the charges which will be made for such services.

The charges which have been and will be made for services rendered to Plaintiff have represented and will represent the usual, reasonable, and customary charges for like or similar services in the vicinity where they have been and will be rendered. All of these services, both past and future, have been and will be made necessary in connection with the proper treatment of the injuries sustained by Plaintiff as a result of this particular incident.

In addition, as a result of his injuries and/or the reasonable and necessary treatment thereof, Plaintiff has sustained a loss of physical capacity in the past and Plaintiff will, in all reasonable probability, continue to suffer from such physical incapacity for a long time in the future, if not for the balance of his natural life. Moreover, said injuries and/or the reasonable and necessary treatment thereof have caused or will cause scarring and/or physical disfigurement of Plaintiff which shall abide with him for the remainder of his life.

The amount of the Plaintiff's damages are substantial and well in excess of the jurisdictional minimums of this Court. Many elements of damage, including pain, suffering and mental anguish in the past and future, past and future physical impairment, and future lost earning capacity, cannot be determined with mathematical precision. Furthermore, the determination of many of these elements of damage is peculiarly within the province of the jury, and Plaintiff cannot presently determine what evidence will be presented at trial. Plaintiff does not at this time seek any certain amount of damages for any of these particular elements of damage, but would instead rely upon the collective wisdom of the jury to determine an amount that would fairly and reasonably compensate him.

However, and only because the Defendant has demanded to know the maximum amount that the Plaintiff could be entitled to, at this time Plaintiff-HOWARD BOYER, specifically pleads that he does not believe that his damages exceed (\$500,000.00). Due to the ambiguities identified hereinabove, Plaintiff reserves the right to either file a trial amendment or an amended pleading on this issue should subsequent evidence show this figure to be either too high or too low.

**VII.**  
**TEX. R. CIV. P. 54**

All conditions precedent to bringing and maintaining this lawsuit have been performed or have occurred.

**VIII.**  
**JURY DEMAND**

PLAINTIFF RESPECTFULLY REQUESTS A TRIAL BY JURY,  
FOR WHICH THE APPROPRIATE FEE HAS BEEN TENDERED.

**IX.  
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the Defendant be cited to appear and answer herein and that, upon final trial of this cause, Plaintiff has:

- (1.) Judgment against the Defendant for actual damages in an amount  
within the jurisdictional limits of this Court;
- (2.) Pre-judgment interest, as allowed by law;
- (3.) Post-judgement interest, as allowed by law;
- (4.) Costs of Court;
- (5.) Costs of Suit; and
- (6.) Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

BRUNKENHOEFER LAW FIRM, P.C.  
520 Lawrence Street  
Corpus Christi, Texas 78401  
Phone No. (361) 888-8808  
Fax No. (361) 888-6753



**Donna B. Everitt**  
SBN: 24045856

**Robert E. Brunkenhoefer**  
SBN: 03256000

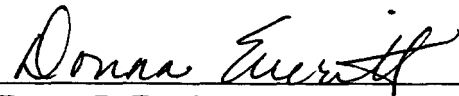
**CERTIFICATE OF SERVICE**

I, Donna B. Everitt, do hereby certify that a true and correct copy of the above and foregoing PLAINTIFF'S SECOND AMENDED PETITION has been served, in the manner indicated below, upon:

Arthur Smith  
507 Prestige Circle  
Allen, Texas 75002-3438

**VIA FAX AND REGULAR MAIL**

in accordance with all applicable provisions of the Texas Rules of Civil Procedure, on this the 30<sup>TH</sup> day of August, 2005.

  
Donna B. Everitt

TAB "3"

CAUSE NO. 05-60900-1

HOWARD BOYER,  
Plaintiff

vs.

HOME DEPOT INTERNATIONAL, INC.,  
Defendant

§  
§  
§  
§  
§  
§  
§

NUECES COUNTY COURT

AT LAW NO. 1

NUECES COUNTY, TEXAS

---

ORDER GRANTING NON-SUIT WITHOUT PREJUDICE

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On the \_\_\_\_ day of \_\_\_\_\_, 2005, the Court having considered Plaintiff's Notice of Nonsuit Without Prejudice of their claims against HOME DEPOT INTERNATIONAL, INC., it is ORDERED, ADJUDGED & DECREED that the Plaintiff's claims against said Defendant are non-suited, without prejudice to Plaintiff's right to re-file same.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the costs of this action be taxed against the party incurring said costs.

SIGNED & ORDERED this the 29 day of July, 2005.

  
\_\_\_\_\_  
PRESIDING JUDGE


RECEIVED  
JUL 11 2005  
PATSY PEREZ, DISTRICT CLERK  
NUECES COUNTY

TAB "4"



# CIVIL DOCKET

CASE NO. \_\_\_\_\_

NUMBER OF CASE	NAMES OF PARTIES	ATTORNEYS	Kind of Action and Party Demanding Jury	DATE OF FILING		
				Mo.	Day	Year
	<b>05 -60900-00-0-1</b> PLNT BOYER, HOWARD ATTY EVERITT, DONNA B. DEFT HOME DEPOT INTERNATIONAL, INC.					
						
FEE BOOK				Jury Fee.		
Vol. Page				Paid by		
				Jury No.		
DATE OF ORDERS		Was Simpligrapher Used?		ORDERS OF COURT		
Month	Day	Year				
<i>7/29/05</i>			<i>Helped with the signature</i>			
			MINUTE BOOK		PROCESS	
			Vol.	Page		
					<i>AA</i>	

[illegible]

TAB "5"

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

HOWARD BOYER,

Plaintiff,

vs.

HOME DEPOT U.S.A., INC.,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. \_\_\_\_\_

JURY DEMANDED

**LIST OF ALL COUNSEL OF RECORD AND PARTIES REPRESENTED**

**Plaintiff**

Howard Boyer

**Plaintiff's Counsel**

Donna B. Everitt  
Brunkenhoefer Law Firm, P.C.  
520 Lawrence Street  
Corpus Christi, Texas 78401  
Telephone: (361) 888-888-8808  
Facsimile: (361) 888-6753

**Defendant**

Home Depot U.S.A., Inc.

**Defendant's Counsel**

Arthur K. Smith  
Law Offices of Arthur K. Smith  
507 Prestige Circle  
Allen, Texas 75002  
Telephone: (469) 519-2500  
Facsimile: (469) 519-2555

JS 44 (Rev. 11/04)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

Howard Boyer

(b) County of Residence of First Listed Plaintiff Nueces  
(EXCEPT IN U.S. PLAINTIFF CASES)

## DEFENDANTS

Home Depot U.S.A., Inc.

County of Residence of First Listed Defendant  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

(c) Attorney's (Firm Name, Address, and Telephone Number)  
Donna B. Everett, Brunkenhoefer Law Firm, P.C.  
520 Lawrence Street, Corpus Christi, TX 78401, (361) 888-8808

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                       |                                       |   |                            |                                       |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1            | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

- |   |   |  |  |  |  |
|---|---|--|--|--|--|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchises | <input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input checked="" type="checkbox"/> 360 Other Personal Injury | <input type="checkbox"/> 362 Personal Injury - Med. Malpractice<br><input type="checkbox"/> 365 Personal Injury - Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture<br><input type="checkbox"/> 620 Other Food & Drug<br><input type="checkbox"/> 625 Drug Related Science of Property 21 USC 881<br><input type="checkbox"/> 630 Liquor Laws<br><input type="checkbox"/> 640 R.R. & Truck<br><input type="checkbox"/> 650 Airline Regs.<br><input type="checkbox"/> 660 Occupational Safety/Health<br><input type="checkbox"/> 690 Other | <input type="checkbox"/> 422 Appeal 28 USC 138<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark | <input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 480 Consumer Credit<br><input type="checkbox"/> 490 Cable/Sat TV<br><input type="checkbox"/> 510 Selective Service<br><input type="checkbox"/> 530 Securities/Commodities/Exchange<br><input type="checkbox"/> 575 Customer Challenge 12 USC 3410<br><input type="checkbox"/> 590 Other Statutory Actions<br><input type="checkbox"/> 591 Agricultural Acts<br><input type="checkbox"/> 592 Economic Stabilization Act<br><input type="checkbox"/> 593 Environmental Matters<br><input type="checkbox"/> 594 Energy Allocation Act<br><input type="checkbox"/> 595 Freedom of Information Act<br><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice<br><input type="checkbox"/> 950 Constitutionality of State Statutes |
|---|---|--|--|--|--|

## V. ORIGIN

- (Place an "X" in One Box Only)
- ☐ 1 Original Proceeding  
☒ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

28 USC § 1332  
Personal injury-negligence

## VII. REQUESTED IN COMPLAINT:

- ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23  
☐ DEMAND \$

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

9/20/05

SIGNATURE OF ATTORNEY OF RECORD

John T. Smith

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG JUDGE \_\_\_\_\_